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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/990,552	11/21/2001	Patrick Thomas Spicer	8423	2572

27752 7590 10/20/2004

THE PROCTER & GAMBLE COMPANY
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EXAMINER

SPEAR, JAMES M

ART UNIT	PAPER NUMBER
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1615

DATE MAILED: 10/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/990,552

Applicant(s)

SPICER ET AL.

Examiner

James M Spear

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 July 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3,4,6,8-11,18 and 20 is/are rejected.
- 7) ☒ Claim(s) 2, 5, 7, 12-17, 19 and 21 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

Art Unit: 1615

The amendment and response submitted July 15, 2004 has been entered.

Following are new grounds of rejection.

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1, 3, 8-11, 18 and 20 are rejected under 35 U.S.C. 102(b) as being anticipated by Yuan US 6,017,388. See examples 1, 3-6 and 12. The currently claimed invention, claim 1 is drawn to a cubic gel precursor that requires (A) an encapsulating compound and (B) an amphiphile capable of forming a cubic liquid crystalline phase and optionally (C) solvent wherein the mass fraction sum of (A) + (B) + (C) = 1, wherein (C) can be 0. The claim also has the proviso that the mass fractions do not fall within a cubic liquid crystalline phase region on a phase diagram representing phase behavior of ingredients (A), (B), and (C). Yuan discloses a high amylose starch (including corn starch and potato starch) emulsifier (monoglyceride such as glyceryl monostearate) compositions and methods for making fine powders of the composition via spray drying. See the instant specification at the paragraph bridging pages 2-3 for a discussion of the teaching of Yuan, WO 00/23517 related to Yuan herein applied US 6,017,388. See column 4, lines 21-50 of Yuan '388. The prior art compositions are both in liquid (aqueous) or dry and comprise the mass fractions of starch + monoglyceride + solvent = 1 or comprises starch + emulsifier = 1 (dry form) wherein the starch constituted 15 % solids and 1, 3 and 6% (of starch weight) of monoglyceride. Columns 6-7, examples 1.

Art Unit: 1615

The wet slurry containing 15% starch solids are mixed with 1, 3 and 6% (of starch weight) of glyceryl monostearate emulsifier and the mixture was preheated to 60 degrees C and pumped through a jet cooker, enzymatically debranched or not by pullulanase and spray dried into a fine powder. The particle sizes for debranched sample at 50% was approximately 4.5 micron and at 90% was approximately 10.5 microns. See example 3 at column 9. Yuan is silent as to the encapsulating ability of the starch. However, instant specification on page 9, lines 15 + defines that the encapsulating compound is a material that at least partially forms an encapsulating shell or matrix around an amphiphile and that generally any polysaccharide polymer will act as an encapsulant when dehydrated by drying. See page 9, lines 15 + for the applicant's definition of an encapsulating compound and page 11, lines 14-20 of the instant application. Applicants' preferred amphiphiles constitute monoglycerides. See page 16, lines 18 +. The reference does not exemplify that the mass fractions of starch, monoglyceride with or without solvent mass fractions taught by the patent fall within a cubic liquid crystalline phase region. Therefore the teachings of Yuan anticipate the claimed cubic gel precursor, under the principles of inherency.

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Art Unit: 1615

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1, 3, 4 and 6 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3 and 10 of U.S. Patent No. 6,656,385 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims are drawn to a cubic gel precursor comprising a hydrotrope (D), an encapsulating compound (A), an amphiphile capable of forming a cubic liquid crystalline phase, and optionally a solvent (C). See claims 1 and 4. The patent claim 10 is drawn to a cubic liquid crystalline phase precursor comprising a hydrotrope, an amphiphile capable of forming a cubic liquid crystalline phase, and an optional solvent, and an additive selected from a tether and combination thereof wherein the tether is a starch derivative. While the patented claims do not recite the presence of an encapsulating compound, the instant application discloses, "any polysaccharide polymer will act as an encapsulant." See page 11, lines 14-20 of the instant application. As such there appears to be an overlap of the claimed invention and therefore the currently claimed invention is deemed to be an obvious variation of the previously issued claims.

5. Claims 2, 5, 7, 12-17, 19 and 20 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 1, 3, 4, 6, 8-11, 18 and 20 are rejected.

Art Unit: 1615

Claims 2, 5, 7, 12-17, 19 and 21 are objected to.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to James M Spear whose telephone number is 571 272 0605. The examiner can normally be reached on Monday thru Friday from 6:30 AM to 3 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman K Page, can be reached on 571 272 0602. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



James M Spear
Primary Examiner
Art Unit 1615

October 16, 2004